Supreme Court, U.S.
FILED
APR 3 2002
OFFICE OF THE CLERK

(3)

No. 01-1349

In the Supreme Court of the United States

POTOMAC CORPORATION,

Petitioner,

v.

TROY SWINTON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

RICHARD R. WINTER
Counsel of Record
SARAH E. PACE
McBRIDE BAKER & COLES
500 West Madison Street
Chicago, Illinois 60661
(312) 715-5700

Counsel for Petitioner

Midwest Law Printing Company/Photex — Chicago — (312) 321-0220

1288

TABLE OF CONTENTS

PAGE

I. RESPONDENT CONFIRMS THAT FACTS ESSENTIAL TO PETITION ARE UNDISPUTED 1

II. RESPONDENT'S CONTENTION THAT THERE IS NO SPLIT AMONG THE CIRCUITS IS WRONG 1

A. The Subsequent Opinion In *Coates v. Sundor Brands, Inc.* Confirms Original Holding, And Applies The Analysis Relied Upon By Petitioner 1

B. The Subsequent Opinion In *Coates v. Sundor Brands, Inc.* Contains The Language And Analysis Relied Upon By Petitioner 3

C. The Holding In *Ocheltree v. Scollon Productions, Inc.* Further Evidences The Split Among The Circuits 5

III. RESPONDENT CONFIRMS THAT IT IS THIS COURT'S DICTA IN *ELLERTH* THAT IS CAUSING CONFUSION OVER THE CONTINUED VIABILITY OF "NEGLIGENCE" THEORY OF LIABILITY 6

IV. RESPONDENT'S "ABUSE OF DISCRETION" ANALYSIS IS IRRELEVANT TO PETITIONER'S ASSERTION THAT EVIDENCE OF POST-OCCURRENCE REMEDIATION EFFORTS MUST ALWAYS BE ADMISSIBLE 8

TABLE OF AUTHORITIES

Cases: PAGE(S)

BMW of North America, Inc. v. Gore,
517 U.S. 559, 116 S. Ct. 1589 (1996) 8, 9

Burlington Industries, Inc. v. Ellerth,
524 U.S. 742, 118 S. Ct. 2257 (1998) 2, 8

Coates v. Sundor Brands, Inc.,
164 F.3d 1361 (11th Cir. 1999) 1, 2, 3, 4

Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 121 S. Ct. 1678 (2001) 9

Kolstad v. American Dental Ass'n,
527 U.S. 526, 119 S. Ct. 2118 (1999) 8

Ocheltree v. Scollon Productions, Inc.,
161 F.3d 3, 1998 WL 482783 (4th Cir. 1998) ... 5, 6

I. RESPONDENT CONFIRMS THAT FACTS ESSENTIAL TO PETITION ARE UNDISPUTED

Despite its level of detail and numerous citations to the Record, Respondent's Statement of the Case confirms that the facts essential to this Petition are undisputed. Those essential facts are: a) that Respondent's supervisor knew of Respondent's racial harassment by co-workers but never reported or redressed that harassment (Opposition, p. 2), and b) that Respondent never complained to his supervisor or anyone in management about the harassment. (Opposition, p. 3).

II. RESPONDENT'S CONTENTION THAT THERE IS NO SPLIT AMONG THE CIRCUITS IS WRONG

Respondent, in his opposition brief, correctly states that the first opinion in *Coates v. Sundor Brands, Inc.*, 160 F.3d 688 (11th Cir. 1998) was withdrawn. But respondent's contention that this erroneous citation means "there is no split in the Circuits on the availability of a claim for negligence for co-worker harassment," is absolutely wrong. (Opposition, p. 6).

A. The Subsequent Opinion In *Coates v. Sundor Brands, Inc.* Confirms Original Holding, And Applies The Analysis Relied Upon By Petitioner

In its subsequent opinion, published at 164 F.3d 1361, the Eleventh Circuit holds, as it did in its original opinion, that the defendant employer was entitled to

summary judgment.[1] As in its first opinion, the court looked to whether the employer had notice of the harassment by virtue of the victim's supervisor's observation of the harassment and whether the employee took reasonable steps to follow the reporting channels contained in the employer's handbook. *Coates v. Sundor Brands, Inc.*, 164 F.3d 1361, 1364 (11th Cir. 1999).

While not specifically labeling it as such, this is a *Faragher* and *Ellerth* analysis, where the two relevant inquires are: 1) whether the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and 2) whether the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 764-65; 118 S. Ct. 2257, 2270 (1998).

In short, both the structure and the substance of the Eleventh Circuit's subsequent opinion in *Coates* reveal that the court in fact *applied*—as it did in its original opinion—the *Faragher/Ellerth* vicarious liability and affirmative defense analysis. The only significant difference between the two opinions, then, is that the Eleventh Circuit cited no authority for the analysis it undertook in the second opinion.

---

[1] There is no indication in the second *Coates* opinion as to the reason for withdrawing the original opinion in favor of the one published at 164 F.3d 1361. The same panel of three judges published both opinions.

B. The Subsequent Opinion In *Coates v. Sundor Brands, Inc.* Contains The Language And Analysis Relied Upon By Petitioner

Respondent argues that there is no circuit split evidenced by *Coates v. Sundor Brands, Inc.*, because "[n]one of the language relied upon by the Petitioner appears in the substituted opinion." (Opposition, p. 7). For the reasons stated in Section II(A), *supra,* this argument is belied by the holding and analysis applied in the substituted opinion. And with respect to the "language relied upon by the Petitioner," Respondent's statement is simply untrue. Judge Barkett, who authored the original opinion in *Coates,* authored a separate concurring opinion in the subsequent publication which contains most of the same language, and *all* of the same reasoning relied upon by Petitioner for the proposition that the *Faragher / Ellerth* affirmative defense must be applied in circumstances where plaintiff's supervisor fails to report or redress co-worker harassment. Specifically, Judge Barkett wrote, *inter alia,* as follows:

> In *Faragher* and *Burlington Industries,* the Court applied this "aided-by-the-agency-relation" standard to cases where the supervisors' own actions constituted the harassing conduct, and held in each case that employers are vicariously liable to victimized employees for such harassment. *See Faragher,* ___ U.S. at ___-___, 118 S. Ct. at 2292-93; *Burlington Industries,* ___ U.S. at ___, 118 S. Ct. at 2270. This standard applies *equally* to cases where the supervisor had adequate notice of a sexually hostile work environment and did nothing to remedy the problem, thus facilitating and prolonging the harassment. The whole point

> of *Faragher* and *Burlington Industries* is that an employer cannot escape liability under Title VII for workplace discrimination when the harm is traceable to the actions of a supervisor acting in the capacity of agent of the employer. And where a supervisor knows of the sexual harassment of an employee by a co-worker and does nothing to remedy the problem, this inaction is both discriminatory and aided by the agency relation.
>
> * * *
>
> A supervisor's failure to act when that supervisor has knowledge of the harassment and the authority to prevent it inflicts harm on the victim that is as real as if the supervisor were doing the harassing. The victimized employee in this situation thus suffers two distinct, discriminatory harms: the co-worker's initial harassment; and the supervisor's implicit approval of the harassment, which changes and intensifies the quality of the injury. In addition, a supervisor's inaction in the face of adequate notice "is facilitated by the existence of the actual agency relationship" as surely as if the supervisor's action created it. *Faragher*, ___ U.S. at ___, 118 S. Ct. at 2290.

Coates v. Sundor Brands, Inc., 164 F.3d at 1368 (concurring opinion).

This concurring analysis addresses head-on the applicability of the *Faragher/Ellerth* vicarious liability and affirmative defense analysis to a case in which the plaintiff's supervisor allegedly failed to redress harassment by a co-worker, and it is in direct conflict with the analysis applied by the Ninth Circuit to the identical issue in this case. Both the concurring opinion and the majority's

analysis and holding in the substituted opinion therefore clearly evidence the Circuit split identified by Petitioner.

C. The Holding In *Ocheltree v. Scollon Productions, Inc.* Further Evidences The Split Among The Circuits

In a separate attempt to neutralize the split among the Circuits, Respondent argues, with respect to the Fourth Circuit's decision in *Ocheltree v. Scollon Productions, Inc.*, 161 F.3d 3, 1998 WL 482783 (4th Cir. 1998), that the Fourth Circuit "recognizes that the theory of negligence still applies to actionable conduct by a non-supervisor or supervisor without immediate or successively higher authority." (Opposition, p. 8). Specifically, Respondent points to Footnote 1 of the *Ocheltree* opinion, which states: "The Supreme Court did not address the extent to which an employer may be vicariously liable for actionable conduct caused by a non-supervisor. Presumably, in those instances, a plaintiff must still show actual or constructive knowledge." (Opposition, p. 8).

Once again, Respondent ignores the Fourth Circuit's holding in an attempt to misdirect the Court's attention. Indeed, Footnote 1 did not prevent the Fourth Circuit from applying the *Faragher/Ellerth* vicarious liability and affirmative defense analysis to the "non-supervisor" co-worker harassment case at hand, in which the plaintiff complained that her immediate supervisor knew of plaintiff's harassment by her co-workers (because plaintiff had reported it), but nevertheless failed to redress the situation. Based on these facts, the Fourth Circuit held that the proper method of analysis was vicarious liability under *Faragher* and *Ellerth* because one of the plaintiff's supervisors "was at least in part responsible for creating

the [hostile] work environment" by being unresponsive to plaintiff's complaints. *Ocheltree*, 1998 WL 482783 at *3.

In so holding, the Fourth Circuit—in direct contrast to what the Ninth Circuit did in this case—chose *not* to apply the negligence analysis to a case involving a supervisor's failure to report or redress co-worker harassment.

III. RESPONDENT CONFIRMS THAT IT IS THIS COURT'S DICTA IN *ELLERTH* THAT IS CAUSING CONFUSION OVER THE CONTINUED VIABILITY OF "NEGLIGENCE" THEORY OF LIABILITY

Respondent's reliance on dicta from *Ellerth* to justify the continued viability of "negligence" liability in cases where plaintiff's supervisor fails to report or redress harassment confirms that this Court must intervene to remedy the confusion, and to prevent the *Faragher/Ellerth* "accommodation" between principles of "vicarious liability" and Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees" from being ignored in practice. Specifically, Respondent states:

> The affirmative defense is limited to cases seeking vicarious employer liability for conduct by a supervisor with immediate authority or above. In reference to co-worker harassment, a negligence theory continues to apply where management either knew or should have known of the harassment and failed to stop it.
>
> > [A]n employer can be liable, nonetheless, where its own negligence is a cause of the harassment. An employer is negligent with respect to sexual harassment if it

> knew or should have known about the conduct and failed to stop it. Negligence sets a minimum standard for employer liability under Title VII, but Ellerth seeks to invoke the more stringent standard of vicarious liability.
>
> *Ellerth, supra,* at 759. A finding that the employer knew or should have known of the harassment and failed to take prompt remedial action forecloses a finding of reasonable care to prevent or correct harassment as an affirmative defense. The two findings are entirely inconsistent.

(Opposition, p. 9).

As noted in Petitioner's original filing, there is a major analytical flaw in this analysis. When the Ninth Circuit held that "what Stewart knew, Potomac knew, and what Stewart failed to do, Potomac failed to do," it collapsed the management structure of Potomac down to one level and found that, as a matter of law, when a front line supervisor observes harassment, the employer has knowledge of the harassment. In such a circumstance, the employer's "negligence" equates to vicarious liability. But under the Ninth Circuit's analysis, the employer is not given the opportunity to demonstrate that it had an alternative reporting procedure in place and that the employee failed to follow it. So while the concept of "negligence" liability may remain viable in some circumstances, in *this case*, and in the dozens of other cases where liability will be premised on a supervisor's failure to report harassment, the "negligence" analysis breaks down.

IV. RESPONDENT'S "ABUSE OF DISCRETION" ANALYSIS IS IRRELEVANT TO PETITIONER'S ASSERTION THAT EVIDENCE OF POST-OCCURRENCE REMEDIATION EFFORTS MUST ALWAYS BE ADMISSIBLE

Petitioner asserts that this Court should grant *certiorari* to clarify that evidence of post-occurrence remediation efforts is always relevant and admissible. (Petition, p. 18). Respondent counters that the district court's exclusion of post-occurrence remediation in this case was not an "abuse of discretion," and that the Ninth Circuit's finding on this point was therefore correct. (Opposition, p. 13).

Respondent's argument misses the mark. Petitioner's contention is not that the district court abused its discretion; it is that the Ninth Circuit created a rule that leaves the admissibility of post-occurrence remediation evidence to the district court's discretion, contrary to this Court's stated objectives in *Kolstad v. American Dental Ass'n,* 527 U.S. 526, 545, 119 S. Ct. 2118, 2129 (1999), *Faragher,* 524 U.S. at 807; 118 S. Ct. at 2292; and *Ellerth*, 524 U.S. at 764; 118 S. Ct. at 2270. (Petition, p. 18-19).

Indeed, this Court has relied upon post-occurrence remediation evidence as a means of mitigating a punitive damages claim. In *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589 (1996), for example, this Court considered, in evaluating the reprehensibility of the conduct at issue, actions taken by the defendant (BMW) after the suit had been filed, as well as *after the judgment had been entered.*

> There is no evidence that BMW acted in bad faith when it sought to establish the appropriate line between presumptively minor damage and dam-

> age requiring disclosure to purchasers. In this regard, it is also significant that there is no evidence that BMW persisted in a course of conduct after it had been adjudged unlawful on even one occasion, let alone repeated occasions.

BMW, 517 U.S. at 571, n. 31; 116 S. Ct. at 1601, n. 31.

Similarly, in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 121 S. Ct. 1678 (2001), this Court made note of actions taken by the defendant both in response to the litigation, and after a preliminary injunction had been entered, when analyzing the question of whether a district court's review of a punitive damages award should be subjected to a *de novo* review on appeal.

Given the importance to this Court of post-occurrence remediation evidence in the context of a punitive damages analysis, and given the fact (pointed out by the Ninth Circuit) that this Court has never "faced head-on" the question of "whether a defendant must be permitted to present evidence of remedial action undertaken after the filing of a complaint as a means of mitigating a punitive damages claim," (Petition App., p. 31), this Court should grant *certiorari* to decide the issue.

Respectfully submitted,

RICHARD R. WINTER
Counsel of Record
SARAH E. PACE
McBRIDE BAKER & COLES
500 West Madison Street
Chicago, Illinois 60661
(312) 715-5700

Counsel for Petitioner